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KOLLIPARA SRIRAMULU

v.

T. ASWATHANARAYANA & ORS.

March 4, 1968

B [J. C. SHAH, V. RAMASWAMI AND G. K. MITTER, JJ.]

Contract—Oral agreement to sell land—Formal document to be executed later but not actually executed—Mode of payment of price not settled—Contract whether binding.

Partition Act 4 of 1893, s. 2—No application made under section—High Court whether empowered to give direction as to allotment of particular area on partition.

C On April 15, 1940 respondent No. 1 took on ten years' lease a site for the purpose of building a cinema theatre, from a partnership firm. He thereafter built a cinema theatre on the land. Appellant No. 1 in 1948 instituted a suit for dissolution of the firm and for accounts. Respondent No. 1 who was impleaded as a defendant resisted the suit. In 1950 the firm filed a suit to evict the first respondent from the leased land. In this suit appellant No. 1 was also impleaded as a defendant and he claimed that D in addition to his original 23 shares in the firm he had acquired 39 shares by purchase. In 1953 respondent No. 1 also filed a suit alleging that all the partners of the firm except the appellant had entered into an oral agreement with him on July 6, 1952 to sell 137 shares in the site except the 23 shares belonging to appellant No. 1; that 98 shares had actually been sold to him; that 39 shares had not been sold to him and had been instead sold to appellant No. 1. Respondent No. 1 thereafter claimed specific performance of the agreement to sell the aforesaid 39 shares by E their owners and contended that the sale of those shares in favour of appellant No. 1 was not binding upon him. The trial court decided against respondent No. 1 but the High Court decided in his favour. In appeal before the Court the following questions came up for consideration : (i) whether there was an oral agreement between respondent No. 1 and all partners of the firm other than appellant No. 1 for sale of their shares on July 6, 1952; (ii) whether the oral agreement was ineffective because the F parties contemplated the execution of a formal document or because the mode of payment of the purchase money was not actually agreed upon; (iii) whether in respect of the 39 shares purchased by him appellant No. 1 was a purchaser without notice; (iv) whether in the absence of an application under s. 2 of the Partition Act 1893 the High Court was right in giving a direction that as far as possible the site upon which the cinema building stood should be allotted to the share of respondent No. 1 if it was comprised within the 137 shares to which he was entitled.

G HELD : (i) On the facts of the case the High Court was right in holding that there was an agreement to sell 137 shares in the site to respondent No. 1.

(ii) A mere reference to a future formal contract does not prevent the existence of a binding agreement between the parties unless the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The H question depends upon the intention of the parties and the special circumstances of each particular case. In the present case the evidence did not show that the drawing up of a written agreement was a pre-requisite to the coming into effect of the oral agreement. [393 C-D]

Nor did the absence of a specific agreement as to the mode of payment necessarily make the agreement ineffective. Since the vital terms of the contract like the price and area of the land and the time for completion of the sale were all fixed. [394 E] A

(iii) The appellant had been unable to establish that in respect of the 39 shares purchased by him he was a purchaser without notice. [395 A-B]

(iv) In the absence of an application by the respondent under s. 2 of the Partition Act the High Court had no power to make a direction as to the particular portion of the site to be allotted to respondent No. 1 on partition. [395 D-E] B

Rama Prasada Rao v. *Subbaramaiah*, (1957) II An. W.R. 488, *Ridgway* v. *Wharton*, 6 H.L.C. 238, *Von Hatzfeldt-Wildenburg* v. *Alexander*, (1912) 1 Ch. 284, *Rossiter* v. *Miller*; 3 A.C. 1124 and *Currimbhoy and Company Ltd.* v. *Creet*, 60 I.A. 297, referred to. C

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 427 and 428 of 1963.

Appeals from the judgment and decree dated March 25, 1960 of the Andhra Pradesh High Court in A.S. Nos. 380 and 381 of 1956. D

H. R. Gokhale and *K. Jayaram*, for the appellant (in both the appeals).

S. T. Desai, P. Parameshwara Rao and *R. V. Pillai*, for the respondents (in both the appeals).

The Judgment of the Court was delivered E

Ramaswami, J. The appellant in both the appeals was one of the partners in a firm consisting of about thirty partners which was running a mill named 'Vasavamba Oil and Rice Mill' at Vijayawada. The partnership firm owned not only a factory but also a site of the extent of about 3845 sq. yards. The total number of shares in the partnership was 160 out of which the appellant owned 23 shares. By a document dated April 15, 1940, the firm executed a lease in favour of the 1st respondent and another person of the area of the site for a period of 10 years. The lessee was permitted to construct a building for the use of a Cinema Theatre. The annual rent was Rs. 750/-. In the year 1948, the appellant filed O.S. No. 196 of 1948 in the Subordinate Judge's Court, Vijayawada for dissolution of the partnership and for accounts. On December 20, 1951 a preliminary decree was granted in that suit. The first respondent was added as 17th defendant in that suit. He contended in that suit that the managing partner of the firm had covenanted to sell to him the site leased out and that in any event he was not liable to eviction in view of the provisions of the Madras Buildings (Lease and Rent Control) Act. In 1950, before the passing of the preliminary decree, a suit was filed in the District Munsiff's Court, Vijayawada F G H

A —O.S. No. 440 of 1950 by the firm and its managing partner against the 1st respondent and others seeking to evict the 1st respondent. On December 20, 1951 a preliminary decree was passed in O.S. No. 196 of 1948 but it was made subject to the rights of the 1st respondent and without prejudice to his contentions. There was a direction in the preliminary decree to sell the B properties of the partnership firm and a receiver was appointed for that purpose. On February 17, 1952 the appellant was transposed as the 3rd plaintiff in O.S. No. 440 of 1950 in the District Munsiff's Court, Vijayawada. As the appellant had by then purchased 39 shares from some of the partners in addition to the 23 shares already owned by him, he claimed partition and separate C possession of 62 shares belonging to him in the said suit. To obtain this relief he applied for an amendment of the plaint which was allowed. By reason of the said amendment the District Munsiff ceased to have jurisdiction over the suit and therefore he directed the return of the plaint for presentation to the Subordinate Judge's Court. The plaint was therefore filed in the Subordinate Judge's court, Vijayawada and numbered as O.S. 203 of D 1954. While this litigation was going on the 1st respondent who had built a Cinema theatre on the site was actively trying to purchase the site from the co-sharers. He filed O.S. No. 124 of 1953 in the Subordinate Judge's court alleging that all the partners of the firm except the appellant had entered into an oral agreement with him on July 6, 1952 to sell 137 shares in the site E and that in pursuance of the agreement partners who owned 98 shares had executed sale deeds in his favour and the other partners owning 39 shares did not do so. The 1st respondent therefore claimed specific performance of the agreement to sell 39 shares owned by the said partners and contended that sale of those shares in favour of the appellant was not binding upon him. F The suit was transferred to the District Court of Masulipatam and was numbered as O.S. No. 1 of 1956. The suit referred to earlier in which the appellant claimed partition and recovery of possession of his 62 shares was also finally transferred to the District Court of Masulipatam and numbered as O.S. No. 2 of 1956. As the main dispute in both the suits was common, namely whether G the appellant was entitled to the 39 shares purchased by him from the partners owning them or whether by reason of the prior oral agreement the 1st respondent was entitled to a conveyance in respect of the shares. It was agreed between the parties that evidence should be taken in both the suits together and what was evidence in the one suit should be treated as evidence in the other suit. By his judgment dated February 28, 1956, the District H Judge held that the 1st respondent had not proved the oral agreement of sale in his favour alleged to have taken place on July 6, 1952. He therefore dismissed the suit for specific performance,

O.S. No. 1 of 1956. For the same reasons he held that in the suit for partition namely, O.S. No. 2 of 1956 the appellant was entitled to 62 shares and he granted a decree for partition and possession thereof as also damages at the rate of Rs. 2,000/- per annum from May 1, 1950 to the date of the delivery of possession of his shares. The 1st respondent took the matter in appeal before the High Court of A. P.—A.S. No. 380 of 1956 against O.S. No. 1 of 1956 and A.S. No. 381 of 1956 against O.S. No. 2 of 1956. By a common judgment dated March 25, 1960 the High Court allowed both the appeals. It was held by the High Court that the oral agreement pleaded by the 1st respondent was true and that the appellant was not a *bona fide* purchaser for value without notice. The High Court accordingly decreed the suit for specific performance. The decree in the partition suit O.S. No. 2 of 1956 was therefore varied. The appellant's share was fixed at 23/160th. A direction was also given by the High Court that in the actual partition, as far as possible, the lower court should allow to respondent No. 1 that portion of the site on which the cinema theatre building constructed by him stood and if that was not possible, the trial court may follow the procedure indicated in *Rama Prasada Rao* v. *Subbaramaiah*(1).

The first question to be considered in these appeals is whether there was an oral agreement between the 1st respondent and all the partners of the firm except the appellant for sale of their shares on July 6, 1952 and whether respondent No. 1 was entitled to specific performance of that oral agreement. It was the case of respondent No. 1 that on July 6, 1952 there was a meeting of all the male partners at the house of Desu Virabhadrayya and at that meeting there was an agreement reached between all of them (except the appellant) and himself that they should sell to him their shares (and the shares of those whom they represented) at the rate of Rs. 3,375/- for eight shares. A written agreement was to be drawn in 2 or 3 days and the mode of payment of the purchase money was also to be settled later. It was further agreed that the sale deeds were to be executed in three months. In pursuance of the agreement all the co-sharers except defendants 1 to 9 executed sale deeds and the plaintiff therefore became the owner of 98 shares. The first witness in proof of the oral agreement was respondent No. 1 himself. He deposed that P.Ws. 5, 6 and 8, Sri Devata Rama Mohana Rao, Sri Addepalli Nageswara Rao and Sri Thoomu Srimannarayana respectively were present at the meeting of the shareholders. He also said that the first defendant, the son of the 2nd defendant, was there to represent the latter, and that Gopala Krishnaiah, son of the 3rd defendant, and the 7th defendant (who represents the 5th and 6th defen-

(1) [1957] II An. W.R. 488.

A dants) and Alavala Subbayya (husband of the 8th defendant and father of the 9th defendant) were present when the agreement was settled. He added that the sale deed was to be executed in three months and that draft agreement, Ex. A-6 was also prepared 2 or 3 days later. On behalf of the appellant reference was made to Ex. B-1, the deposition of the first respondent in the B previous suit, where he said that the agreement was on July 1, 1952 and that he did not remember the names of the other persons present at the meeting except P.W. 8, Sri Subba Rao Nayudu, Vice President of Andhra Bank. In our opinion, the discrepancy is immaterial and the High Court was right in accepting the evidence of this witness as true. The evidence of respondent No. 1 C is corroborated by P.W. 7 who said that except the women shareholders all other shareholders were present at the meeting of July 6, 1952 and the subject for consideration was the sale of the site of the cinema theatre to respondent No. 1. He added that the price of the whole site was fixed at Rs. 67,500/- and that all the partners except the appellant agreed to sell away their shares. On behalf of the appellant reference was made to the counter-affida- D vit, B-4 dated January 5, 1953 filed in interlocutory proceedings on behalf of P.W. 7, but there is no serious contradiction between the evidence of that witness in Ex. B-4 and the evidence of P.W. 7 in the present suit. The High Court was highly impressed with the evidence of P.W. 7 and we see no reason for taking a different view in regard to the credibility of this witness. P.W. 8 was E also present at the meeting on July 6, 1952. His evidence corroborates that of respondent No. 1. He said that the son of the appellant was present at the meeting and the women shareholders were represented by some men on their behalf. It is true that P.W. 8 is the cousin brother of respondent No. 1, but this can be no ground in itself for rejecting his testimony. P.Ws 2 and 3 F have also given important corroborative evidence. P.W. 2, Sri D. Subba Rao is the Subordinate Judge of Bapatla. He deposed that the first respondent told him that there was an oral agreement for the purchase of the shares concluded in the first week of July, 1952. Exhibit A-22 dated July 9, 1952, a letter written by P.W. 2 to respondent No. 1 supports the evidence of P.W. 2 P.W. 3, Sri S. Narayana Rao, a District Judge and a family friend G of respondent No. 1 also testified that he was informed of the negotiations by the first respondent for purchasing the shares and he was also told by the first respondent about the conclusion of the agreement. Exhibit A-26 dated July 14, 1952, a letter written by him to the first respondent, supports this evidence. P.Ws. 2 and 3 are highly respectable witnesses and the High Court was H right in taking the view that their evidence strongly corroborates the case of respondent No. 1 with regard to the conclusion of the oral agreement for sale on July 6, 1952. The evidence of respon-

dent No. 1 is also corroborated by the evidence of P.Ws. 5 and 6 Sri Devata Rama Mohana Rao and Sri Addepalli Nageswara Rao which has been believed by the High Court. On behalf of the appellant it was said that respondent No. 1 has not given any reason in the plaint or in the evidence as to why a written agreement was not entered into. There may be some force in this argument. But no such question was put to P.W. 1 in cross-examination, nor was he asked to give any explanation. On the other hand, there are important circumstances indicating that the case of the first respondent with regard to the oral agreement is highly probable. In the first place, respondent No. 1 had built a valuable cinema theatre building on the disputed site and he had very strong reasons to make an outright purchase of the site otherwise he would be placed in a precarious legal position. Negotiations for purchase were going on for several years past and considering this background, the case of the first respondent with regard to the oral agreement appears highly probable. P.W. 2, a Subordinate Judge and P.W. 3, a District Judge have both given evidence which corroborates the case of respondent No. 1 with regard to the conclusion of the oral agreement on July 6, 1952 and there is no reason suggested on behalf of the appellant for discarding their evidence. It is also important to notice that 20 out of 30 shareholders executed sale deeds in favour of the first respondent after the date of the alleged oral agreement on July 6, 1952. The fact that the shareholders sold their shares at the identical price to the first respondent and the others sold at the same price to the appellant is only explicable on the hypothesis that the price was fixed by agreement between all the shareholders willing to sell *i.e.*, all those other than the appellant. The last of the sale deeds executed in favour of the appellant or the first respondent are Exs. A-11 and A-12 dated February 28, 1953. There is evidence that prices were rising meanwhile and therefore the circumstance that the vendors chose to sell at the same price renders it highly probable that there was an earlier binding agreement. It is also an important circumstance against the appellant that none of the women shareholders has appeared in the witness box to rebut the evidence tendered on behalf of respondent No. 1. There was evidence given on behalf of respondent No. 1 that the women partners had authorised the men partners to represent them at the meeting but none of the women partners entered the witness box to deny such authorisation. On behalf of the appellant reliance was placed upon the circular letter, Ex. A-15 purported to be written by one Gopi Setti Venkata Subba Rao, one of the shareholders. The document is not signed by respondent No. 1. It appears to be a notice prepared by one of the shareholders to be circulated *inter se* among them and refers to the mode of payment of the purchase money agreed to between respondent No. 1

A B C D E F G H

A and the persons selling the shares. The High Court has observed tive. The mere omission to settle the mode of payment does not case of respondent No. 1 and we see no reason to take a dffierent view as regards the effect of Ex. A-15.

We proceed to consider the next question raised in these appeals, namely whether the oral agreement was ineffective because the parties contemplated the execution of a formal document or because the mode of payment of the purchase money was not actually agreed upon. It was submitted on behalf of the appellant that there was no contract because the sale was conditional upon a regular agreement being executed and no such agreement was executed. We do not accept this argument as correct. It is well-established that a mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. As observed by the Lord Chancellor (Lord Cranworth) in *Ridgway* v. *Wharton*(1) the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement In *Von Hatzfeldt-Wildenburg* v. *Alexander*(2) it was stated by Parker, J. as follows :

> "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further conract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

In other words, there may be a case where the signing of a further formal agreement is made a condition or term of the bargain, and

(1) 6 H.L.C. 238, 263. (2) [1912] 1 Ch. 284, 288.

if the formal agreement is not approved and signed there is no concluded contract. In *Rossier v. Miller*(1) Lord Cairns said :

> "If you find not an unqualified acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise then you cannot find a concluded contract."

In *Currimbhoy and Company Ltd.* v. *Creet*(2) the Judicial Committee expressed the view that the principle of the English law which is summarised in the judgment of Parker, J. in *Von Hatzfeldt-Wildenburg* v. *Alexander*(3) was be applicable in India. The question in the present appeals is whether the execution of a formal agreement was intended to be a condition of the bargain dated July 6, 1952 or whether it was a mere expression of the desire of the parties for a formal agreement which can be ignored. The evidence adduced on behalf of respondent No. 1 does not show that the drawing up of a written agreement was a pre-requisite to the coming into effect of the oral agreement. It is therefore not possible to accept the contention of the appellant that the oral agreement was ineffective in law because there is no execution of any formal written document. As regards the other point, it is true that there is no specific agreement with regard to the mode of payment but this does not necessarily make the agreement ineffective. The mere omission to settle the mode of payment does not affect the completeness of the contract because the vital terms of the contract like the price and area of the land and the time for completion of the sale were all fixed. We accordingly hold that Mr. Gokhale is unable to make good his argument on this aspect of the case.

We shall next deal with the question whether the appellant was a *bona fide* purchaser for value without notice of the prior oral agreement. The first sale deed obtained by the appellant was on July 29, 1952. P.W. 2 stated in his evidence that the appellant told him that he had been aware of the agreement in favour of respondent No. 1 at the time of the purchases under Exs. B-6 to B-10. It is true that P.W. 2 added that the appellant did not say distinctly that he was aware of the agreement between the respondent and defendants 1 to 9. Upon this point the appellant himself was unable to remember whether he had told P.W. 2 to that effect. In any case, P.Ws. 5 and 6 deposed that they went to the appellant on July 7, 1952 and asked him to part with his shares in favour of respondent No. 1. It is not denied by the appellant that he met P.Ws. 5 and 6 on July 7, 1952. It is also

(1) 3 A.C. 1124. (2) 60 I.A. 297.

(3) [1912] 1 Ch. 284.

A significant that the purchase money paid by the appellant was very nearly the same as that payable under the agreement in respondent No. 1's favour. On the basis of his evidence the High Court reached the conclusion that the appellant had notice of the prior oral agreement. We see no reason to differ from the finding of the High Court on this point.

B It was finally contended that the High Court ought not to have given any direction that as far as possible the site upon which the cinema building stands should be allotted to the share of respondent No. 1 if it is comprised within the 137 shares to which he was entitled. It was stated on behalf of the appellant that there was no equity in favour of respondent No. 1 as he was a C lessee for 10 years and all the constructions were made with the full knowledge that he was a lessee for a limited period. In any case, it was said that the appellant should have been given permission under s. 3 of the Partition Act (Partition Act No. IV of 1893) when respondent No. 1 himself invoked the provisions of s. 2 of that Act. It was also argued that the High Court had D no jurisdiction to modify any portion of the judgment dated March 25, 1960 by a subsequent order dated June 21, 1960 without an application for review. In our opinion, the contention put forward on behalf of the appellant is well-founded and since no application was made on behalf of the first respondent under s. 2 of the Partition Act we are of opinion that the following direction E of the High Court in the preliminary decree should be deleted :

> "(7) That the lower Court shall as for as possible allot to the appellant the site upon which the appellants' buildings stand and further direct that if that procedure cannot be adopted conveniently or equitably the procedure laid down in the judgment reported in 1957(2) F A.W.R. page 488 be followed."

It will, of course, be open to the parties to make representations and for the High Court to give equitable directions in the allotment of shares to be made in the final partition decree.

Subject to this modification, we affirm the judgment and G decree of the High Court of Andhra Pradesh in A.S. Nos. 380 and 381 of 1956 dated March 25, 1960 and dismiss these appeals with costs—there will be one hearing fee.

G.C. *Appeals dismissed.*